CLERK'S COPY.

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 571 / 15

WHEELER LUMBER BRIDGE AND SUPPLY COMPANY OF DES MOINES, IOWA,

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

FILED DECEMBER 8, 1928

(33,880)

(33,880)

SUPREME COURT OF THE UNITED STATES

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WHEELER LUMBER BRIDGE AND SUPPLY COMPANY OF DES MOINES, IOWA,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1929

[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

DECEMBER TERM, 1927

No. E-567

WHEELER LUMBER BRIDGE AND SUPPLY COMPANY OF DES MOINES, IOWA, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

Before Chief Justice Booth, Judge Moss, Judge Green, Judge Sinnott

Mr. Jesse I. Miller appeared for the plaintiff.

Mr. Herman J. Galloway, Assistant Attorney General, and Mr. Joseph H. Sheppard appeared for the defendant.

STATEMENT OF FACTS

The Court of Claims of the United States hereby certifies that the record of the above-entitled cause now pending before it discloses the following.

The Wheeler Lumber Bridge and Supply Company of Des Moines, Iowa, duly filed its petition in the Court of Claims on the 14th day of November, 1925, praying judgment against the United States in the sum of $1,833.89 with interest, as will more fully appear from the petition, a copy of which accompanies this certificate as Exhibit A.

The cause was duly referred to one of the commissioners of the court, who duly filed his report herein on October [fol. 2] 11, 1927, a copy of which accompanies this certificate as Exhibit B, the correctness and accuracy of which report is conceded by both parties and no exceptions thereto were filed.

There being a division of the court in this case and the court being in doubt, we are of the opinion that the case cannot properly be disposed of without certifying to the Supreme Court certain questions of law involved therein concerning certain sections of the Revenue Acts of 1917

and 1918, and receiving the instructions of said Supreme Court thereon. The provisions of said Revenue Acts are as follows:

Sections 500, 501 and 502 of the Revenue Act of 1917 (40 Stat. 314, 315) which provide as follows:

"Section 500. That from and after the 1st day of November, 1917, there shall be levied, assessed, collected and paid (a) a tax equivalent to 3% of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another. * * *

"Section 501. That the taxes imposed by Section 500 shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered.

"Section 502. That no tax shall be imposed under Section 500 upon any payment received for services rendered to the United States, or any state, territory, or the District of Columbia. The right to exemption under this Section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe."

Sections 500 and 501 of the Revenue Act of 1918 (40 Stat. 1101, 1102) which read as follows:

"Section 500. That from and after April 1, 1919, there shall be levied, assessed, collected and paid in lieu of taxes [fol. 3] imposed by Section 500 of the Revenue Act of 1917—(a) a tax equivalent to 3% of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight transported from one point in the United States to another. * * *

"(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner with the approval of the Secretary, may by regulation prescribe."

"Section 501. (a) That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered."

As appears from the facts found herein, the plaintiff during the years 1918, 1919, 1920 and 1921 on orders obtained by its salesmen sold certain quantities of lumber to nine counties in the State of Nebraska and to one county in the State of Iowa, said lumber having been ordered by said counties for the purpose of repairing or building bridges in those counties, such repairing or building in all cases being performed directly by employees of the respective counties. The plaintiff's salesmen obtained the orders for said lumber from the county commissioners or boards of county supervisors, and in each and every instance the prices quoted by the salesmen and accepted by the county officials were f. o. b. at points of delivery in the respective counties, said points being later designated by the said county officials. The lumber was shipped to the various counties from southern or Pacific or other points and was consigned to the plaintiff or to the order of the shipper at destination. Freight bills and invoices covering these shipments were forwarded to the county clerks by [fol. 4] the plaintiff and upon arrival of the shipments the said clerks would present the freight bills to the railroad authorities, pay the freight, obtain receipted freight bills and accept the shipments. The county clerks then deducted the amount of the freight charges from the invoices and forwarded to plaintiff the receipted freight bills and checks for the balance. In each instance the amount of the check plus the amount of the freight bill totaled the price which the county contracted to pay for the lumber at the time the order was placed with the salesman. A typical invoice, such as was used by the plaintiff, covering each shipment involved in the case appears in finding V of the commissioner's report.

The contention of the plaintiff is that the transportation charges above described were payments received by the common carriers for services rendered to the several county governments referred to and that said transportation charges were therefore exempt from the transportation tax by virtue of Sections 502 of the Revenue Act of

1917 and 500 (h) of the Revenue Act of 1918, respectively, and the decision of the Supreme Court of the United States in the case of Panhandle Oil Company v. The State of Mississippi, decided on May 14, 1928 (No. 288, October term, 1927), and that the transportation charges in each instance having been paid directly by the respective county governments, the liability, if any, for the transportation tax attached to said county governments and not to the plaintiff. [fol. 5] The contention of the defendant is that the transportation services rendered in this case were rendered by the railroad to the plaintiff and not to the various county governments referred to and, therefore, do not fall within the exemption of the revenue statutes.

Under these circumstances this court being divided and being in doubt as to the application of said exemption sections of said Revenue Acts and of said case of the Panhandle Oil Company of Mississippi against the United States desires the instructions of the Supreme Court upon the following question, a decision on which is deemed indispensable to the disposition of this case now before it and a proper discharge of the court's duties herein.

Question Certified

Question: Where lumber is purchased by a county from a private corporation for the purpose of repairing or building, directly through its own employees, bridges in said county, said lumber to be delivered f. o. b. at a specified point and said lumber is shipped from various points consigned to the plaintiff or to the order of the shipper and payment of the freight charge is made by the county clerk of said county and the amount thereof deducted from the invoice price of said lumber, the balance of said invoice being later remitted by said county clerk to the plaintiff, are the services rendered in the transportation of said lumber rendered to said county within the provisions of Section 502 of the Revenue Act of 1917 (40 Stat. 314, 315) and Section 500 (h) of the Revenue Act of 1918 (40 Stat. 1101, 1102) and the decision of the Supreme Court of the United States in said case of the Panhandle Oil Company v. the State of Mississippi, 277 U. S. 218.

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above question, certify and transmit the same to the Court [fol. 6] of Claims of the United States for its guidance in the further progress of the case.

Fenton W. Booth, Chief Justice; McKenzie Moss, Judge; Wm. R. Green, Judge; N. J. Sinnott, Judge, the judges who sat on the hearing of the case.

[fol. 7] Clerk's certificate to foregoing omitted in printing.

[fol. 8] EXHIBIT A TO CERTIFICATE

IN THE UNITED STATES COURT OF CLAIMS

No. E-567

WHEELER LUMBER BRIDGE AND SUPPLY COMPANY of DES MOINES, IOWA, Petitioner,

vs.

THE UNITED STATES, Respondent

PETITION—Filed November 14, 1925

To the Honorable the Chief Justice and the Judges of the Court of Claims:

The claimant, Wheeler Lumber Bridge and Supply Company of Des Moines, Iowa, a corporation, respectfully states:

I

The Wheeler Lumber Bridge and Supply Company of Des Moines, Iowa, is and was at all times hereinafter mentioned a corporation duly created under the laws of the State of Iowa and organized and existing for the purpose of and at all times hereinafter mentioned engaged in manufacturing and selling lumber and building supplies.

II

On the 3rd day of October, 1917, the President of the United States approved an Act entitled "The Revenue Act of 1917," Sections 500, 501 and 502, of which provided in part as follows:

[fol. 9] "Section 500. That from and after the 1st day of November, 1917, there shall be levied, assessed, collected and paid (a) a tax equivalent to 3% of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another. * * *

"Section 501. That the taxes imposed by Section 500 shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered.

"Section 502. That no tax shall be imposed under Section 500 upon any payment received for services rendered to the United States, or any state, territory, or the District of Columbia. The right to exemption under this Section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe."

On the 24th day of February, 1919, the President of the United States approved an Act entitled "The Revenue Act of 1918," Sections 500 and 501, of which provided in part as follows:

"Section 500. That from and after April 1, 1919, there shall be levied, assessed, collected and paid in lieu of taxes imposed by Section 500 of the Revenue Act of 1917—(a) a tax equivalent to 3% of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight transported from one point in the United States to another. * * *

"(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner

with the approval of the Secretary, may by regulation prescribe."

"Section 501. (a). That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered."

That the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury did by Treasury Department Regulations No. 49 promulgated under the authority of the said Revenue Act of 1918 provide as follows:

[fol. 10] "Article 97. The right to exemption under Section 500 from the tax on amounts paid for the transportation of property shall be evidenced in one of the following ways:

"(a) payment of such amounts directly to the carrier by the government to which the services are rendered."

III

Claimant states that during the period June 1, 1918 to August 31, 1921, it sold to certain County Governments in the States of Nebraska and Iowa, all of which Counties are listed on the attached schedule marked "A" certain lumber which was purchased by said various Counties for the construction and repairing of bridges within such respective counties. Said material was sold with the understanding that it was to be used exclusively by the said County governments for the construction and repairing of bridges within said respective counties under the direct supervision of the respective Boards of Supervisors and County Engineers of said counties and not by any contractor or subcontractor doing said work for said counties. Said materials were used by said counties respectively in the manner above indicated. Said materials were purchased by each county at a stipulated price per thousand feet board measure f. o. b. claimant's yards. It was stipulated and agreed, however, between claimant and each of said respective counties that there should be added to the said purchase price in each instance the delivery charges between the point of shipment and the point of delivery. Said lumber was, therefore, in each instance, billed to said respective counties at a price which represented the price

per thousand feet plus delivery charges. Claimant states [fol. 11] that such agreement was made with each County as a matter of convenience only and with the understanding that each respective County was to pay the transportation charges thereon and deduct the same from the amount of the bill rendered in each case by claimant.

IV

Said agreements were made by claimant after having first consulted the Collector of Internal Revenue at Dubuque, Iowa, with respect thereto. It was the purpose of claimant and the respective counties involved to save for each county the tax imposed by Section 500 of the Revenue Act of 1917 and Section 500 of the Revenue Act of 1918. Claimant was advised by the Collector of Internal Revenue at Dubuque, Iowa, that if said lumber was shipped to the respective counties in the manner indicated in the next preceding paragraph the freight bills covering the transportation of said lumber, if paid by said respective counties, would in each instance be exempt from the payment of the transportation tax levied by the Revenue Acts of 1917 and 1918. That each County understood that the price agreed to be paid by it for lumber included transportation charges thereon; that each County government understood that such transportation charges were to be paid by it and that each shipment was billed in the manner indicated in order that said counties should have the benefit of the exemption provided in the Revenue Acts of 1917 and 1918.

[fol. 12]

V

That the freight bills covering each of said shipments of lumber were actually paid by the respective counties purchasing said shipments directly to the proper common carriers and said payments were then deducted by the respective counties from the amount of the bills rendered therefor by claimant.

VI

Claimant states that between June 1, 1918 and August 31, 1921, it made various shipments of lumber to the several County governments set out on schedule "A" hereof.

That the transportation charges on each of such shipments were paid by the respective county governments purchasing same but that no transportation tax was paid thereon by said county governments. Thereafter the Collector of Internal Revenue at Dubuque, Iowa, after having previously advised claimant that such shipments were exempt from the transportation tax attempted to assess against and collect from this plaintiff the transportation taxes involved in said shipments. Said taxes upon said shipments were from time to time thereafter assessed against claimant by said Collector but all said assessments were abated by claimant pending a final decision by the Collector. Thereafter and on or about the 1st day of November, 1923, said abatement claims were finally rejected by the Collector of Internal Revenue at Dubuque, Iowa, and the Commissioner of Internal Revenue and the said Collector demanded of claimant the various amounts of taxes, interest [fol. 13] and penalties involved in said shipment all of which are set out in detail on Schedule "A" hereof and which aggregated $1,833.89.

VII

Thereafter, to-wit, between November 17, 1923, and January 3, 1924, claimant paid to the said Collector of Internal Revenue, Dubuque, Iowa, under protest and duress the sum of $1,833.89 representing the amounts of taxes, interest and penalties involved in said shipments.

VIII

Immediately thereafter and on or about January 3, 1924, claimant duly filed an application to the Bureau of Internal Revenue, to-wit a claim for refund on Treasury Department, form No. 843, praying for the refund of the sum of $1,833.89, representing the payment of said taxes, interest and penalties aforesaid. Said application was in all respects regular and in accordance with the law and regulations and was accompanied by all the necessary evidence and proof of facts. The facts alleged in said application were not traversed or denied by the Secretary of the Treasury or the Commissioner of Internal Revenue or by any representative of the United States. Although said application was in all respects complete and in due form, neverthe-

less on or about the 10th day of June, 1925, the Commissioner of Internal Revenue rejected and denied said application and has continuously denied and refused to pay claimant the moneys asked for and demanded in its application as aforesaid, as shown by the records of the Treasury Department hereby referred to and prayed to be considered a part of this petition.

[fol. 14] IX

Your petitioner is advised by counsel and therefore avers that the taxes collected from it as set out above were illegally and erroneously collected for the following reasons, to-wit:

(a) That the said transportation charges hereinabove described were payments received by certain common carriers for services rendered to the several county governments herein referred to and that said transportation charges, were, therefore, exempted from the transportation tax by Sections 502 of the Revenue Act of 1917 and 500 (h) of the Revenue Act of 1918, respectively; and that

(b) The transportation charges in each instance having been paid directly by the respective county governments, the liability, if any, for the transportation tax, attached to said county governments and not to claimant.

X

No action upon this claim other than herein set forth has been taken before the Congress or any of the Departments of the Government.

XI

Your petitioner avers that there is justly due and owing to it on account of the matters hereinbefore set forth the sum of $1,833.89 with interest thereon from November 17, 1923, after deducting all just offsets and payments on the part of the United States; that it is the sole owner of the claim herein sued upon, that no asignment or transfer of the claim or any part thereof or any interest in the same has been made and that it is a citizen of the United States and loyal to the United States Government and has not at

any time aided or abetted in any manner or given comfort [fol. 15] to any sovereign government that is or ever has been at war with the United States.

Wherefore your petitioner prays judgment against the United States in the sum of $1,833.89 with interest.

Wheeler Lumber Bridge and Supply Company of Des Moines, Iowa, by Jesse I. Miller, Attorney for Claimant.

Duly sworn to by Jesse I. Miller. Jurat omitted in printing.

[fol. 16] SCHEDULE A TO PETITION

Wheeler Lumber Bridge and Supply Co.

List of Transportation Taxes, Penalties, and Interest Paid by Wheeler Lumber Bridge and Supply Co.

County	Tax	Interest	Penalty	Total
1. Pierce County, Nebr.	$297.11	$14.86	$99.59	$114.45
2. Dawes County, Nebr.	111.15	.....	45.70	45.70
3. Johnson County, Nebr.	5.33	.27	3.01	3.28
4. Keith County, Nebr.	54.02	2.70	17.74	20.44
5. Clay County, Nebr.	39.91	2.00	14.79	16.79
6. Nickolls County, Nebr.	171.38	8.57	68.84	77.41
7. Dawson County, Nebr.	51.33	2.56	17.59	20.15
8. Dawson County, Nebr.	44.07	2.21	18.30	20.51
9. Nance County, Nebr.	291.50	.....	81.42	81.42
10. Lincoln County, Nebr.	43.61	2.18	17.80	19.98
11. Appanoose County, Iowa.	200.72	10.04	93.59	103.63
Tax	$1,310.13	$45.39	$478.37	$523.76
Penalty and Interest	523.76			
Total	$1,833.89			

[fol. 17] EXHIBIT B TO CERTIFICATE

COURT OF CLAIMS OF THE UNITED STATES

No. E-567

WHEELER LUMBER, BRIDGE & SUPPLY COMPANY

v.

THE UNITED STATES

REPORT OF COMMISSIONER—Filed October 11, 1927

To the Honorable the Chief Justice and Associate Judges of the Court of Claims of the United States:

Pursuant to the order of reference in the above-entitled

cause dated April 30, 1927, Myron M. Cohen, commissioner, herewith reports the following facts:

I

The plaintiff, during the period involved in this suit, was and still is a corporation duly organized and existing under the laws of the State of Iowa with its principal places of business at Des Moines, Iowa.

II

During the years 1918, 1919, 1920, and 1921, the plaintiff, on orders obtained by its salesmen, sold certain quantities of lumber to nine counties in the State of Nebraska and to one county in the State of Iowa, said lumber having been ordered by the said counties for the purpose of repairing or building bridges in those counties. The bridge repairing or building in all cases was to be performed directly by employees of the respective counties.

[fol. 18]

III

Plaintiff's salesmen obtained the orders for the said lumber from the county commissioners or boards of county supervisors and in each and every instance the prices quoted by the salesmen and accepted by the county officials were f. o. b. at points of delivery in the respective counties, said points to be later designated by the said county officials.

IV

The lumber was shipped to the various counties from southern or Pacific or other points and was consigned to the plaintiff or to the order of the shipper at destination. Freight bills and invoices covering these shipments were forwarded to the county clerks by the plaintiff and upon the arrival of the shipments the said clerks would present the freight bills to the railroad authorities, pay the freight, obtain receipted freight bills, and accept the shipments. The county clerks then deducted the amount of the freight charges from the invoices and forwarded to plaintiff the

receipted freight bills and checks for the balance. In each instance the amount of the check plus the amount of the freight bill totaled the price which the county contracted to pay for the lumber at the time the order was placed with the salesman.

V

The following is a typical invoice which was used by the plaintiff covering each shipment involved in this case:

[fol. 19] Des Moines, Iowa, April 27, 1920.

DAWSON COUNTY, NEBR.:

O. D. Smith, County Commissioner, Cozad, Nebr., Neil France, Clerk, Lexington, Nebr., to the Wheeler Lumber, Bridge & Supply Co., Dr.

Fir and Oak Bridge Lumber, Red Cedar Posts, Cypress, Red Cedar and Oak Piling

200 South West Ninth Street

Phone: Walnut 630. Terms: Net 30 days. Car No. and Initial IC 97005

#1 fir, rough:

573 pcs 3 x 12-16′ 27, 504′, $52.50	$1,443.96
Deduct for freight pd	465.35
	978.61

May 7, 1920, shipped to Cozad, Nebr.

Notice to Purchaser.—This invoice will become due and subject to sight draft sixty days from date of Bill of lading covering shipment. Positively no discounts are allowed.

Amount of invoice	$1,443.96
Estimated freight	457.00
Amount due	986.36

If not paid when due, we will assume the liberty to draw on you for the amount due together with all charges for collection and exchange added to the net amount. If not

honored, will charge you 7 per cent interest on all accounts past due. Exchange must be paid by purchaser.

Attached to each invoice was a notice or paster as follows:

Upon arrival of this shipment at destination, kindly secure freight bill in duplicate, sending to us the original immediately upon payment of same, retaining duplicate for your own files if you wish it. This original freight bill is a [fol. 20] part payment for the lumber sold you, a receipt for a portion of our money, and it is very necessary that we have this document in order that we may check it up for any overcharges that may exist, such as overweights, incorrect rates, stake allowances, etc., thereby obtaining prompt action from the railroads. You no doubt are not aware of the fact that the claim department of a railroad will give a claim more consideration, quicker action, and quicker settlement if we file with them the original paid freight bill at the same time claim is filed.

We are notified that the railroads under Government operation will no longer consider claims for shortage when supported by affidavit alone, but that paid expense bills must carry notation of shortage before claims will be considered.

It is therefore very necessary that if any shortage is found when unloading this shipment you report immediately to the railroad agent and insist that notation be made by him on expense bill, showing that you claim shortage, and how much.

Your courtesy and cooperation in the above matters are politely solicited. Will you not kindly give us your aid?

Wheeler Lumber, Bridge & Supply Co., Des Moines, Iowa.

VI

On March 7, 1918, the plaintiff addressed the following letter, Plaintiff's Exhibit I-A, to the deputy collector of internal revenue at Dubuque, Iowa:

[fol. 21] March 7, 1918.

Louis Murphy, U. S. Revenue Collector, Dubuque, Iowa.

Dear Sir: Would like to have you advise us whether or not freight shipments consigned to counties and municipali-

ties are subject to the 3% war tax now assessed by the railroads. We understand that the railroad fares of State employees and other like officials are not subject to the tax on passengers when these officials are traveling in the interest of the State, and we are wondering whether or not shipments of bridge material consigned to the various counties would be exempt from the tax on freight.

Thanking you in advance for your prompt reply, we are,

Very truly yours, (Signed) Wheeler Lumber, Bridge & Supply Co., by P. E. Hoak, Traffic Mgr.

peh-se.

There then followed the following correspondence between the plaintiff and the deputy collector of internal revenue at Dubuque, Iowa, which letters have been offered in evidence as Plaintiff's Exhibits I-B, I-C, and I-D, respectively.

March 22, 1918.

Wheeler Lumber, Bridge & Supply Co., Des Moines, Iowa.

GENTLEMEN: Replying to your letter of March 7th, you are advised that freight shipments consigned to counties and municipalities are exempt from the 3% war tax in the [fol. 22] event that the county or municipality pays the freight charges.

State employees and like officials in discharge of their duties are exempt from the tax upon railroad fares.

It will be necessary in all cases of shipments made by freight or express, where Government bills or lading are not used, for the officer or employees of the United States, State, Territory, or District of Columbia to satisfy the agent to whom the charges are paid that the service rendered is for the United States, State, Territory, or District of Columbia, as the case may be, and the agent collecting the charges should note on the records of his office the name of the consignor and consignee, and indicate thereon that such shipment covered service rendered the United States, State, Territory, or District of Columbia, as the case may be, and was not subject to the tax.

Respectfully, (Signed) Louis Murphy, Collector.

March 23, 1918.

Louis Murphy, U. S. Collector, Dubuque, Iowa.

DEAR SIR: Have your letter of the 22d inst., and enclosed you will find copy of bill of lading used on all our shipments of lumber which we made to the different counties in this State and Nebraska. We use a shipper's order form, which is a negotiable instrument, and our shipments are billed to ourselves for the reason that the interstate com- [fol. 23] merce law specifically provides that it shall be unlawful for any carrier to give information to any party relative to a shipment except that party be the consignor or the consignee.

We quite often want to file claims for overcharges on freight, or trace the shipment while in transit, and in fact there are many conditions which arise during the course of business, making it very imperative that we appear on the bill of lading as consignee. All those shipments are lumber for different counties. We are wondering whether or not it would be sufficient that the agent of the carrier at the different destinations satisfy himself upon delivery of shipment that it is for the county in order that no war tax be assessed. You understand that our shipments are of lumber sold at delivered price, which includes freight charges and the county auditor pays the freight and deducts this freight from the gross amount of our bill and then remits to us the balance after deducting the freight he has paid. We are wondering just what action is necessary on our part in order to eliminate this war tax. Any information you can give us will be greatly appreciated.

There are many shipments made since the first of November, on which tax has been assessed, and which no doubt should be refunded. Please advise us just what action is necessary to get this refund on these shipments.

Awaiting to hear from you further, we are,

Very truly yours, (Signed) Wheeler Lumber, Bridge & Supply Co., by P. H. Hoak, Traffic Mgr.

peh-se.

[fol. 24] March 27, 1918.

Wheeler Lumber, Bridge & Supply Co., Des Moines, Iowa.

GENTLEMEN: In reply to your letter of March 23, relative to the nontaxability of your shipments consigned to various counties in this and other States, you are advised, as per information contained in my letter to you of March 22, that it will be necessary in all cases of shipments consigned to the county, for the county auditor, to satisfy the agent at point of destination that the shipment is intended to be used directly for the county and that in such a case tax may be waived. It will be necessary for the railroad company collecting these charges to note on the records of their office the name of the consignor and consignee and indicate thereon that such shipment was intended for the United States, State, or a political subdivision thereof.

By this method of procedure it is believed that the railroad agent will waive tax on all shipments of this kind.

"Relative to shipments made since the first of November, on which tax has been assessed and which you claim should be refunded, wish to quote for your information the following:

"Since, in the ordinary course of transportation, overcharges and undercharges will occur, officers, agents, and other employees of carriers are authorized, in adjusting such overcharges and undercharges to adjust the tax accordingly. Nothing in these regulations, however, authorizes an adjustment of a tax by a carrier in any instance [fol. 25] where, after collection of a charge and tax, it is claimed that the charge is entitled to exemption from the tax by reason of exportation, governmental use, or otherwise."

Respectfully, (Signed) Louis Murphy, Collector.

VII

On and between November 16, 1923, and January 3, 1924, the collector of internal revenue at Dubuque, Iowa, assessed and collected $1,833.89 from the plaintiff to cover excise taxes on freight transportation and penalties, and interest for the period from June, 1918, to August, 1921, on the sales

of lumber involved herein. Of that amount, $1,310.13 was the tax on the freight transportation, $478.37 was the penalty, and $45.39 was the interest. The taxes including the interest and penalties were all paid under protest as shown by the several receipts introduced in evidence as Plaintiff's Exhibits No. 13. With the exception of one carload of lumber sold to Nance County, Nebr., on January 15, 1918, and one carload of lumber sold to the same county on February 19, 1918, all of the shipments upon which the taxes were assessed were made subsequent to the correspondence set out in Paragraph VI hereof.

VIII

The plaintiff subsequently filed with the Commissioner of Internal Revenue at Washington a claim for refund of the $1,833.89 paid by it, and on June 10, 1925, the said claim was rejected by the commissioner.

[fol. 26]

IX

The plaintiff is the sole owner of the claim involved in this suit and has made no assignment thereof or any part thereof or interest therein.

Respectfully submitted,
Myron M. Cohen, Commissioner.

[Endorsed:] Court of Claims. No. E-567. Wheeler Lumber Bridge & Supply Company of Des Moines, Iowa, v. The United States. Filed Dec. 3, 1928, Court of Claims.

Endorsed on cover: File No. 33,880. Court of Claims. Term No. 571. Wheeler Lumber Bridge and Supply Company of Des Moines, Iowa, vs. The United States of America. (Certificate.) Filed Dec. 8th, 1928. File No. 33,880.

FILE COPY

Office Supreme Court, U
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FEB 12 1929
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

OCTOBER TERM,

No. 574. 15

WHEELER LUMBER BRIDGE & SUPPLY COMPANY,
vs.
UNITED STATES OF AMERICA.

BRIEF FOR WHEELER LUMBER BRIDGE & SUPPLY CO.

JESSE I. MILLER,
Attorney for Wheeler Lumber Bridge & Supply Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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POINTS AND AUTHORITIES.

I. Plaintiff was not liable for the tax under Section 502 of the Revenue Act of 1917 or Section 500 (h) of the Revenue Act of 1918.... 4-8

Sections 500, 501 and 502, Revenue Act of 1917.

Sections 500 (h) and 501, Revenue Act of 1918.

City of Wichita Falls v. United States, 62 Ct. Cls. 239; writ of certiorari denied 273 U. S. 750.

II. The Shipments were exempt under Panhandle Oil Company v. Mississippi 8-16

Panhandle Oil Co. v. Mississippi, 277 U. S. 218.

Flint v. Stone-Tracy Co., 220 U. S. 107; 55 L. ed. 389.

Kennett, Parochial Antiquities, 46.

Blackstone (Sharswood) 1 Comm. 356.

Washer v. Bullitt County, 110 U. S. 558; 28 L. ed. 249.

13 Ruling Case Law, 79.

Federal Aid Road Act of 1916 (39 Stat. 355).

IN THE

Supreme Court of the United States

OCTOBER TERM,

No. 571.

WHEELER LUMBER BRIDGE & SUPPLY COMPANY,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR WHEELER LUMBER BRIDGE & SUPPLY CO.

This case is before the Court upon a certificate of the Court of Claims for instructions on the question of law hereinafter stated, arising out of the following.

FACTS.

During the years 1918, 1919, 1920, and 1921, the Wheeler Lumber Bridge & Supply Company (plaintiff below) sold certain quantities of lumber to nine counties in the State of Nebraska and one county in the State of Iowa, the said lumber having been purchased by said counties for the purpose of building and re-

pairing bridges in their respective public highways. Such repairing and building were in all cases performed entirely and directly by employees of the said county governments. (R. pp. 1-4.)

Prior to making these sales, plaintiff advised the Collector of Internal Revenue at Dubuque, Iowa, of the manner in which it was contemplated that lumber would be sold and shipped and requested information as to whether or not there would be, under the circumstances hereinafter detailed, any liability for the transportation tax then in effect. (R. pp. 14-17.)

The Collector advised the Company that if "the shipment is intended to be used directly for the county," no transportation tax liability would attach. (R. p. 17.)

Thereupon, plaintiff entered into the various contracts referred to above. Its salesmen obtained the orders for said lumber from the County Commissioners or the Boards of County Supervisors, the prices agreed upon in each instance being f. o. b. at points of delivery. The lumber was then shipped from Southern or Pacific points to the various counties and was consigned to plaintiff or its order at destination. Freight bills and invoices covering the shipments were forwarded to the respective county clerks by plaintiff and, upon arrival of the shipments, said clerks would present the freight bills to the carrier, pay the freight, obtain receipted freight bills and accept the shipments. The county clerks then deducted the amount of the freight charges from the invoices and forwarded to plaintiff the receipted freight bills and checks for the balances of the invoices. In each instance, the amount of the checks plus the freight bills totaled the price which the county had contracted to pay for the lumber.

No transportation tax was collected from the county

clerks by the carriers on any of these shipments. However, after settlement had been made with plaintiff by all the county governments, the Collector compelled plaintiff to pay the tax alleged to have been due on each shipment.

Suit to recover these taxes having been brought in the Court of Claims, that Court, being in doubt as to the proper disposition of the issues of law involved, has certified the following question to this Court for instruction:

> "QUESTION: Where lumber is purchased by a county from a private corporation for the purpose of repairing or building, directly through its own employees, bridges in said county, said lumber to be delivered f. o. b. at a specified point and said lumber is shipped from various points consigned to the plaintiff or to the order of the shipper and payment of the freight charge is made by the county clerk of said county and the amount thereof deducted from the invoice price of said lumber, the balance of said invoice being later remitted by said county clerk to the plaintiff, are the services rendered in the transportation of said lumber rendered to said county within the provisions of Section 502 of the Revenue Act of 1917 (40 Stat. 314, 315) and Section 500 (h) of the Revenue Act of 1918 (40 Stat. 1101, 1102) and the decision of the Supreme Court of the United States in said case of the *Panhandle Oil Company v. State of Mississippi*, 277 U. S. 218." (R. p. 4.)

Separating this query into its component parts, it appears to involve the determination of two questions:

(1) Was plaintiff liable for the transportation tax under Section 502 of the Revenue Act of 1917 and Section 500 (h) of the Revenue Act of 1918, and, if so,

(2) Were the shipments exempt from the tax under the principle laid down by this Court in *Panhandle Oil Company vs. Mississippi, supra*?

I.

WAS PLAINTIFF LIABLE FOR THE TAX UNDER SECTION 502 OF THE ACT OF 1917 AND SECTION 500 (h) OF THE ACT OF 1918?

The material provisions of law here involved are Sections 500, 501, and 502 of the Revenue Act of 1917 and Section 500 and 501 of the Revenue Act of 1918 which are set out in the margin.* Since the provisions of both Acts are substantially the same, with the exception of the arrangement of the several pertinent pro-

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Revenue Act of 1917.

"Section 500. That from and after the 1st day of November, 1917, there shall be levied, assessed, collected and paid (a) a tax equivalent to 3% of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another. * * *

"Section 501. That the taxes imposed by Section 500 shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered.

"Section 502. That no tax shall be imposed under Section 500 upon any payment received for services rendered to the United States, or any state, territory, or the District of Columbia. The right to exemption under this Section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe."

Revenue Act of 1918.

"Section 500. That from and after April 1, 1919, there shall be levied, assessed, collected and paid in lieu of taxes imposed by Section 500 of the Revenue Act of 1917—(a) a tax equivalent to 3% of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight transported from one point in the United States to another. * * *

"(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner with the approval of the Secretary, may by regulation prescribe."

"Section 501. (a) That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered."

visions, all following references will be, for purposes of brevity, to the 1918 Act.

Section 500 imposes a tax of 3 per cent on the amount of all transportation charges on shipments by freight within the United States. Subsection (h) provides, however, that no tax shall be imposed upon any payment received "for services rendered to the United States or to any State or Territory, or the District of Columbia." Section 501 provides that the tax imposed by Section 500 "shall be paid by the person paying for the services * * * rendered."

It will be observed, therefore, that the liability for the tax is imposed upon "the person *paying for* the services," but that tax shall not be imposed upon "services rendered to * * * any state * * *."

It will be remembered that the lumber in question was shipped f. o. b. destination, consigned to plaintiff or its order at destination. The government contends that, under these conditions, the services, *as a matter of law*, were rendered to the shipper and not to the county government. For present purposes, this proposition may be conceded.

Even if this be true, however, plaintiff did not become liable for the tax. That liability is imposed upon "the person *paying for* the services," and not upon the person for whom the services are rendered.

If these services were rendered to the state, they were exempt from the tax; but if they were not so rendered and were not exempt, the liability still remained upon "the person paying for the services."

In the case at bar, plaintiff contends that the county government, was in each instance, "the person paying for the services" within the meaning of the Act, and that such county government, and not plaintiff, was

liable, if any liability existed. The government contends that the transportation charges were paid by the county government out of moneys belonging to plaintiff, and that plaintiff was therefore, "the person paying for the services."

The government's contention here is obviously unsound and is directly opposed to the interpretation placed upon the law by the Treasury Department's own regulations.

Treasury Department Regulations No. 49 (Revised) promulgated January 17, 1920, provided, by Article 110 thereof, that—

> "All taxes imposed by Section 500 shall be paid by the person *from whom or from which the carrier collects the charges for the services* or facilities rendered. The method of adjusting transportation expenses between the buyer and seller, or the consignor and the consignee *is a matter of private contract over which the Government has no jurisdiction.*" (Italics ours)

This regulation laid down the only possible rule for the collection of the transportation tax. The tax was imposed by the Act and by the Treasury Department's construction of it upon the "person paying for the services" that is, upon the person "from whom or from which the carrier collects the charges for the services or facilities rendered."

The carriers, upon which was imposed the burden of collecting the tax, could not possibly administer this part of the Act unless the tax was collected from the person *actually paying the transportation charges.* The carriers could not be and were not expected to hold a judicial inquiry over every bill of lading pre-

sented for the purpose of determining the person to whom the services, as a matter of law, were rendered.

The Act, therefore, imposed the liability directly upon the person *from whom the carrier collected the charges.* It seems most untimely that, at this late date, the government should contend for a contrary construction.

The county governments, in the case at bar, were the persons "from which the carrier collected the charges" and they are the persons "*paying for* the services" and liable for the tax, if any liability existed.

It is pertinent here to refer to the case of *City of Wichita Falls v. United States,* 62 Ct. Cls. 239 (writ of certiorari denied, 273 U. S. 750). In that case the contractual arrangement between the city and the shipper was substantially identical with that in the case at bar. There the government asserted liability *against the city which had actually paid the freight charges,* and not against the shipper which had sold the goods at an agreed delivered price. In the case at bar, however, the government seeks to reverse this order and to hold the shipper liable under the same conditions under which, in the *Wichita Falls* case, the consignee was held liable. This, it is submitted, it cannot do, regardless of the construction that may be put upon Section 500 (h).

That section grants an exemption from tax when the services are rendered to the state. Its purpose, obviously, is to recognize by statute the exemption which already existed under the Federal Constitution. The statute cannot narrow or curtail the constitutional right. In its last analysis, therefore, the right to exemption in the case at bar is at least as comprehensive as the Constitution guarantees.

This court, in *Panhandle Oil Company vs. Mississippi, supra*, has defined the scope of that exemption. Its application to the case at bar is, therefore, necessary.

II.

WERE THE SHIPMENTS EXEMPT UNDER PANHANDLE OIL COMPANY VS. MISSISSIPPI?

Since the decision in the *Panhandle Oil* case is, in counsel's opinion, decisive of the case at bar, it will now be analyzed.

In that case, it appeared that a statute of Mississippi provided that

> "any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1 cent per gallon upon the sale of gasoline,"

with certain exceptions not here material.

Since the enactment of that statute in 1922, the Panhandle Oil Company had been engaged in the distribution of gasoline. The State of Mississippi sued to recover taxes claimed on account of sales made by the Oil Company to the United States for the use of its Coast Guard fleet in service in the Gulf of Mexico and its Veteran's Hospital at Gulfport. The Company defended on the ground that the statute, if construed to impose taxes on these sales, was repugnant to the Federal Constitution.

The Supreme Court of Mississippi held the tax valid on the ground that it was a privilege tax on the dealer, measured by the number of gallons of gasoline sold

and it was, therefore, not a tax on any instrumentality of the Federal Government.

In reversing the case, this Court said:

> "While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, *it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.*
>
> The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. Wagner v. Covington, 251 U. S. 95, 102, 64 L ed. 157, 167, 40 Sup. Ct. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. *It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests.* The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. * * * *To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale.* * * * And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the state." (Italics ours.)

The position of this Court, as disclosed by the foregoing language, is unmistakable. Regardless of any technical liability for the tax, the court holds that ex-

cises of the sort there involved necessarily place a burden upon the transaction which, as a practical matter, is ultimately borne by the purchaser. Thus, this court held that a state, *"may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes."*

This principle is obviously reciprocal. The same fundamental reasons which prohibit the state from imposing the burden of its tax upon the Federal government operate to preclude the Federal government from laying a similar burden on the state.

Paraphrasing the language of this court, it may, therefore, be confidently stated that *"the Federal government may not lay any tax upon transactions by which the state secures the things desired for its governmental purposes."*

In the case at bar, the statute laid a tax upon the transportation of articles by freight. The county governments entered into transactions looking toward securing lumber to repair bridges in their public highways. The United States asserted the tax upon the idea that it was payable by the vendor and hence no burden fell upon the County government. That fact, however, is immaterial. This court has said "Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests." "The necessary operation" of the tax was to pass the burden to the purchaser.

This is particularly apparent in the case at bar. Before making any sales to the county governments, plaintiff sought the advice of the Collector of Internal Revenue to determine whether a tax would attach to the shipments. When it was advised that no tax would attach it quoted certain delivered prices to the county

governments. Can it be doubted that if the Collector had indicated that a tax would have to be paid, the county governments would have purchased the lumber as cheaply as they did?

Hence, *both as a matter of law and as a matter of fact*, the burden of tax fell upon the counties in these transactions. If they were entered into for the purpose of securing "the things desired for governmental purposes" they were clearly exempt.

It is necessary, therefore, only to determine whether the maintenance of bridges in their public highways was the exercise of a *governmental function* by the several county governments here involved, or whether that function was of such a quasi-private nature as to destroy the exemption.

"The true distinction"

said this court in *Flint vs. Stone-Tracy Co.*, 220 U. S. 107; 55 L. ed. 389, 422,

> "is between the attempted taxation of those operations of the state essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes; the latter, although regulated by the state, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate Federal taxation."

Is the maintenance of a bridge in a public highway an *act of government*, one "which the state can only do itself" or is it of such a quasi-private nature as to take it out of the category of governmental function?

It will be seen that the maintenance of public bridges and of public highways in general is not only a function of government today but that it is one of the most ancient of all functions of government and has always inhered, as such, in Anglo-Saxon jurisprudence.

The government of Rome was built upon its public roads. One of the vital functions of the Roman state was the maintenance of its military highways. No man, under Roman law, was exempt from the obligation to labor or contribute labor in the construction and repair of roads and bridges.

The same obligation was recognized by ancient Saxon law. Service in repairing bridges was a part of the *trinoda necessitas*—the threefold necessary public duties to which all lands were liable, viz.: for repairing bridges, for maintaining castles or garrisons, and for expeditions to repel invasion. In the immunities enumerated in the king's grants, these words were always encountered: *"exceptis his tribus, expeditione, pontis et arcis constructione"*. Kennett, Parochial Antiquities, 46.

The same obligation is noted by Blackstone (Sharswood I Com. 356). Thus:

> "Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy; this being part of the *trinoda necessitas,* to which every man's estate was subject; viz., *expeditio contra hostem, arcium constructio, et pontium reparatio.* For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the

Roman law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum, nullius-que dignitatis ac venerationis meritis, cessare oportet.* And indeed now, for the most part, the care of the roads only seems to be left to parishes, that of bridges being in great measure devolved upon the country at large by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect: but it was not then incumbent on any particular officer to call the parish together and set them upon this work: for which reason, by the statute 2 & 3 Ph. and M. c. 8, surveyors of the highways were ordered to be chosen in every parish.

* * * * * * * *

"They (surveyors of the highways) are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labour in fetching materials, or repairing the highways: all persons keeping draughts (of three horses, etc.) or occupying lands, being obliged to send a team for every draught, and for every 50 £ a year which they keep or occupy; persons keeping less than a draught, or occupying less than 50 £ a year, to contribute in a less proportion; and all others persons chargeable, between the ages of eighteen and sixty-five, to work or find a labourer."

These earliest of personal obligations to the state, viz.: service in the army, in the fortress, and on the roads and bridges—flowed from the corresponding recognized functions of government, viz.: to raise armies, to maintain fortresses and to preserve intact the public highways and bridges.

The history of Anglo-Saxon law reveals no departure from this concept. The maintenance of public

bridges and highways is still one of the recognized functions of government. Thus, this court said in *Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249, 251, quoting from *Hamilton Co. v. Mighels*, 7 Ohio St. 109:

> "A county is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration in matters of finance, education, provision for the poor, military organization, and of *means of travel and transportation*," etc. (Italics ours)

In *Atkin vs. Kansas*, 191 U. S. 207, 48 L. ed. 149, 157, this Court said:

> "The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is *one of the functions of government to provide public highways for the comfort and convenience of the people.* Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it.
>
> Whether done by the state directly or by one of its instrumentalities, *the work was of a public, not private character.*" (Italics ours)

The same principle is stated in Ruling Case Law as follows:

> "The opening, construction and maintenance of public highways *is purely a governmental function* * * *,*"

citing numerous cases. 13 R. C. L. 79.

Within the past fifteen years the public character of road maintenance has been tremendously empha-

sized. With the unprecedented development of motor transportation within that period has come an era of road building which has assumed not only a local but a national significance. Beginning with the Federal Aid Road Act of 1916 (39 Stat. 355), the Federal government has launched a campaign of cooperation with the several states for the purpose of creating a system of national highways jointly maintained by the federal and local governments. See Acts of February 28, 1919 (40 Stat. 1200); November 9, 1921 (42 Stat. 212); June 19, 1922 (42 Stat. 660); January 22, 1923 (42 Stat. 1157); February 26, 1923 (42 Stat. 1321); March 10, 1924 (43 Stat. 17); June 5, 1924 (43 Stat. 460); February 10, 1925 (43 Stat. 852); February 12, 1925 (43 Stat. 889); May 11, 1926 (44 Stat. 530); January 18, 1927 (44 Stat. 1006); May 16, 1928 (Pub. 392—70th Congress); May 26, 1928 (Pub. 519—70th Congress).

The execution of this new scheme can scarcely be said to be quasi-private in its nature.

It may be safely stated, therefore, that since the written record began, it has been fundamental in Anglo-Saxon law that one of the functions of government has been the construction and maintenance of public bridges and highways and that these earliest of concepts not only have remained intact but that within recent years have taken on an added significance.

It would seem scarcely necessary to have elaborated this proposition save for the fact that it was suggested below that the construction and repair of the bridges by the county governments was not the exercise of a governmental function of the sort which would justify the exemption from the transportation tax. It

is believed that the foregoing fully and conclusively destroys any such suggestion.

CONCLUSION.

It is, therefore, submitted that the construction and repair of the bridges here involved by the county governments was the exercise of a governmental function and that the transactions whereby those county governments secured the lumber desired for such work were exempt from the transportation tax.

Respectfully submitted,

JESSE I. MILLER,
Attorney for Wheeler Lumber Bridge & Supply Company.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

WHEELER LUMBER BRIDGE AND SUPPLY COMPANY OF DES MOINES, IOWA

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The Court of Claims rendered no opinion.

JURISDICTION

The case is here on a question of law certified to this Court by the Court of Claims pursuant to Section 3(a) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The question certified is as follows (R. 4):

> Where lumber is purchased by a county from a private corporation for the purpose of repairing or building, directly through its

own employees, bridges in said county, said lumber to be delivered f. o. b. at a specified point and said lumber is shipped from various points consigned to the plaintiff or to the order of the shipper and payment of the freight charge is made by the county clerk of said county and the amount thereof deducted from the invoice price of said lumber, the balance of said invoice being later remitted by said county clerk to the plaintiff, are the services rendered in the transportation of said lumber rendered to said county within the provisions of Section 502 of the Revenue Act of 1917 (40 Stat. 314, 315) and Section 500 (h) of the Revenue Act of 1918 (40 Stat. 1101, 1102) and the decision of the Supreme Court of the United States in said case of the *Panhandle Oil Company* v. *The State of Mississippi,* 277 U. S. 218.

THE STATUTES INVOLVED

Revenue Act of 1917 (c. 63, 40 Stat. 300, 314, 315):

SEC. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another * * *.

SEC. 501. That the taxes imposed by section five hundred shall be paid by the person,

corporation, partnership, or association paying for the services or facilities rendered.

* * * * *

SEC. 502. That no tax shall be imposed under section five hundred upon any payment received for services rendered to the United States, or any State, Territory, or the District of Columbia. The right to exemption under this section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe.

SEC. 503. That each person, corporation, partnership, or association receiving any payments referred to in section five hundred shall collect the amount of the tax, if any, imposed by such section from the person, corporation, partnership, or association making such payments * * *.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1101, 1102, 1103:

SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

(a) A tax equivalent to 3 per centum of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water, of property by freight transported from one point in the United States to another * * *.

* * * * *

(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

SEC. 501(a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * *

SEC. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments * * *.

THE REGULATIONS

Regulations 42, issued March 18, 1918, under the Revenue Act of 1917, provide:

ART. 14. *Nature of exemption.*—Section 502 of the act exempts from taxation payments received for services rendered to the United States, to any State or Territory, or to the District of Columbia. The words "State" and "Territory" include political subdivisions thereof, such as counties, cities, towns, and other municipalities. The exemption, however, is to be secured only upon the production of such evidence of right to exemption as is called for by these regulations.

ART. 15. *Evidences of right to exemption.*—The right to exemption under section 502 from the tax on amounts paid for the transportation of property shall be evidenced in one of the following ways:

(a) Payment of such amounts directly to the carrier by the Government to which the services are rendered.

(b) A standard form of exemption certificate for use of the Federal Government, substantially in form following:

(Here appears form of certificate.)

(c) A form of exemption certificate, substantially in accord with the preceding form, for use by any of the States or Alaska or Hawaii, or any political subdivision thereof, or the District of Columbia, showing the political subdivision by which the charges have been, or will be, paid.

ART. 17. *Credentials.*—The credentials referred to on the margin of the exemption certificates are such papers, documents, or other evidences as will reasonably assure the officer, agent, or other employee collecting the transportation charge that the officer or employee issuing such certificate is an officer or employee of the Government on whose behalf the certificate is issued.

ART. 21. *Certificate required when charges paid.*—An exemption certificate for property or persons or other evidence of right to exemption, all as provided in articles 15 and

16, must be delivered to the carrier by the person paying the charges when the charges are paid; otherwise there shall be no exemption from the tax.

Similar provisions are contained in the Regulations under the 1918 Act. Additional pertinent provisions in the later Regulations are as follows:

Regulations 49, issued May 1, 1919, under the 1918 Act:

ART. 80. *Prepaid charges.*—Where transportation charges, either prepaid or collect, are paid by the shipper at origin of the shipment, or by a contractor at destination of the shipment, upon property shipped to the United States Government or to a State or Territory or the District of Columbia, or to a Government contractor, and the payment of such charges is in behalf of the Government, and the amount paid therefor is borne by the Government, such amounts are not subject to the tax. Exemption certificates properly signed by a governmental officer or employee must be furnished to the carrier as evidence of such rights to exemption.

Regulations 49, revised July 19, 1921:

Art. 97(d) The exemption does not apply to transportation charges which are not actually borne by a governmental agency. Thus, in the case of property sold to such an agency *f. o. b. destination,* the charges for transporting the property to point of delivery, being paid by the seller, would be taxable. (Italics ours.)

STATEMENT

The Wheeler Lumber Bridge and Supply Company (plaintiff below), during the years 1918, 1919, 1920, and 1921, sold certain quantities of lumber to nine counties in the State of Nebraska and one county in the State of Iowa. Said lumber was purchased for the purpose of building or repairing bridges in the respective counties, and the work involved was to be performed by county employees. Orders for the lumber were obtained by salesmen of the plaintiff company from the county commissioners or boards of county supervisors, and in each and every instance the prices quoted by the salesmen and accepted by the county officials were f. o. b. points of delivery in the respective counties, said points to be later designated. The lumber was accordingly shipped and was consigned to the plaintiff or to the order of the shipper at the designated points in the various counties. (R. 3, 12.)

Freight bills and invoices covering the shipments were forwarded to the county clerks by the plaintiff and upon arrival of the shipments the said clerks would present the freight bills to the railroad authorities, pay the freight charges, obtain receipted freight bills, and accept the shipments. The county clerks then deducted the amount of the freight charges from the invoices and forwarded to the plaintiff checks for the balance, together with the receipted freight bills. (R. 3, 12, 13.)

In each instance the amount of the check, plus the amount of the freight bill, totaled the price which the county contracted to pay for the lumber at the time the order was placed with the salesman. (R. 3, 13.)

SUMMARY OF ARGUMENT

The certificate of the Court of Claims raises only the question whether the transportation services involved were services rendered to the counties and therefore exempt from tax under the express provisions of the Revenue Acts of 1917 and 1918 and this Court's decision in *Panhandle Oil Co.* v. *State of Mississippi*, 277 U. S. 218. The certificate leaves no room for plaintiff's argument that even if such services were not services rendered to the counties, but to the plaintiff, the plaintiff is not taxable because both Revenue Acts provide that the tax shall be imposed upon those paying for the transportation, and in this case the freight charges were paid by the counties themselves.

If the question raised by plaintiff is properly presented, the plaintiff is nevertheless responsible for the tax because the counties, in paying the freight charges, were acting only as plaintiff's agents.

The *Panhandle Oil Company* decision is not controlling. The tax here involved was not laid upon the sale of the lumber to the counties. The lumber was sold to the counties f. o. b. points of desti-

nation in the counties. The tax was levied upon the transportation of the lumber to those points, the sale to the counties not being consummated until *after* the lumber had been so transported. No direct burden on the sale resulted from the tax.

ARGUMENT

I

PLAINTIFF CAN NOT RECOVER UNLESS THE TRANSPORTATION HERE INVOLVED WAS EXEMPT FROM TAX

The plaintiff argues that even if the services here in question are not services rendered to the counties, and therefore not exempt from the transportation tax under the Revenue Acts of 1917 and 1918, and the decision of this Court in *Panhandle Oil Company* v. *State of Mississippi*, 277 U. S. 218, nevertheless, since both Revenue Acts provide that the tax shall be paid by the person paying for the services or facilities rendered, and in this case the counties made the actual cash payment of the freight charges involved, the tax should also have been paid by the counties and the plaintiff was not liable therefor.

The question thus sought to be raised does not seem to be presented by the certificate of the Court of Claims. That certificate asks only whether the services are to be regarded as services rendered to the counties, and does not question that if they are not to be so regarded, and are not exempt from tax, the Government was within its rights in compelling

payment by the plaintiff, who was the shipper, consignee, and person ultimately responsible for the tax. And even if the question is properly presented, it seems clear that, since the counties were acting only as agents for the plaintiff, the plaintiff was the person paying for the services within the meaning of the Revenue Acts, and therefore responsible to the Government for the tax, although the Government might no doubt have insisted that the agents pay the tax with the transportation charges, and have refused to look to the principal for payment of the tax, upon the theory that the Government was not charged with determining the exact relation between principal and agent. That the Government *may* collect the tax from the agent with the transportation charges does not mean that it has no recourse against the principal in a case where the tax was not collected from the agent.

II

THE TRANSPORTATION HERE INVOLVED WAS NOT EXEMPT FROM TAX

So far as this case is concerned, we agree with the plaintiff that the statutory exemption from tax under the Revenue Acts is practically coextensive with the constitutional right of a State or subdivision thereof to exemption from Federal taxation. The question, therefore, in last analysis, is whether the transportation here involved was exempt from

tax under the decision of this Court in the *Panhandle Oil Company case*. In that case the Court said (p. 222):

> Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale.

In the present case the sale to and purchase by the county was not the transaction by which the tax was measured and on which the burden rested. The sales were f. o. b. at points of destination. The tax was determined by the distance the plaintiff transported the lumber *before* the sale to the county, and was an expense preliminary to sale, not a burden upon the sale. Of course, all such expenses incurred prior to sale by a manufacturer or vendor probably add to the selling price of his product, but this does not make them a direct burden on the sale within the rule in the *Panhandle Oil Company case*.

CONCLUSION

The transportation services in question were not services rendered to the counties, and therefore were not exempt from tax under the Revenue Acts of 1917 and 1918 and the *Panhandle Oil Company*

decision. The plaintiff was properly responsible for the tax.

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APRIL, 1929.

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SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1929.

Wheeler Lumber Bridge and Supply Company of Des Moines, Iowa, *vs.* The United States of America. } On Certificate from Court of Claims

[May 26, 1930.]

Mr. Justice Van Devanter delivered the opinion of the Court.

The Court of Claims has certified to us a question concerning which it desires instruction for the proper disposition of the above entitled cause now pending before it. Late in the last term we dismissed the certificate in the belief that the question propounded embraces the whole case, and so could not be answered consistently with the applicable statute or with the constitutional limitations on our jurisdiction. But before the term closed we vacated the order of dismissal and held the matter for further consideration.

The facts shown in the certificate are as follows: In the years 1918, 1919, 1920 and 1921 the plaintiff, a corporate dealer in bridge materials, engaged to sell and deliver to each of several counties in the States of Iowa and Nebraska a quantity of lumber, which in each instance was needed and used by the purchasing county in the construction or repair of bridges along public highways within the county. The plaintiff was to ship the lumber from places outside the State to designated points within the purchasing county and there deliver the same to the county f. o. b. at stated prices. The plaintiff fulfilled its engagement as made. The shipping was done by railroad under bills of lading calling for delivery by the carrier to the plaintiff, or on its order, at destination. The plaintiff forwarded the bills of lading to the county clerk; and when the shipments reached their destination the county clerk, acting for the county and conforming to the plaintiff's intention, presented the bills of lading to the carrier, paid the transportation charges, accepted the lumber, deducted the transportation charges

from the stipulated f. o. b. price and remitted the balance to the plaintiff.

The federal revenue laws in force at the time imposed on the transportation of freight by rail or water a tax of three per cent of the amount paid for that service; required that the tax be paid "by the person paying for the service"; and authorized the carrier to collect the tax on behalf of the government; but declared that transportation service rendered to a State should be exempt from the tax. Revenue Act 1917, c. 63, §§ 500, 501, 502, 503, 40 Stat. 300, 314, 315; Revenue Act 1918, c. 18, §§ 500 (a) and (h), 501 (a), 502, 40 Stat. 1057, 1101, 1102, 1103. In the administrative regulations issued under those laws the exemption of transportation service to a State was construed as including such service to her "political subdivisions, such as counties, cities, towns, and other municipalities".

No tax on the transportation service was demanded or paid when the transportation charges were paid. But thereafter the Collector of Internal Revenue assessed such a tax against the plaintiff and the plaintiff paid it under protest. Application was then made by the plaintiff to have the amount refunded; but the application was denied by the Commissioner of Internal Revenue.

The suit in the Court of Claims was brought by the plaintiff against the United States to recover the amount collected on the tax—that exaction being assailed on two grounds: One that the transportation service was rendered to the purchasing counties, and therefore was exempt from the tax, and the other that, as the counties paid the carrier its transportation charges, the liability, if any, for the tax did not attach to the plaintiff.

The certificate further shows that the court referred the case to a commissioner who, in accord with the reference, reported special findings of fact; and that both parties conceded the correctness and accuracy of the report. In making the certificate the court accepted and summarized the facts reported by its commissioner.

The question certified, somewhat shortened in words but not altered in substance, is—

Where a vendor, who has engaged to sell and deliver lumber needed for public bridges to a county at a designated point in the county f. o. b. at a stated price, ships the lumber by rail to that point preparatory to there effecting the required delivery and for-

wards the bills of lading to the county, and the latter, conformably to the vendor's intention, surrenders the bills of lading to the carrier, pays its transportation charges, receives the lumber from it, deducts from the f. o. b. price at destination the transportation charges paid to the carrier, and remits the balance to the vendor—is the transportation of the lumber to the place of delivery a service rendered to the county [State] within the meaning of the exempting provisions of § 502 of the Revenue Act of 1917 and § 500(h) of the Revenue Act of 1918, and within the principle recognized and applied in *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218?

The statute providing for certification of questions by the Court of Claims is § 3 (a) of the act of February 13, 1925, c. 229, 43 Stat. 936, 939, which reads:

"That in any case in the Court of Claims, including those begun under section 180 of the Judicial Code, that court at any time may certify to the Supreme Court any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the cause; and thereupon the Supreme Court may give appropriate instructions on the questions certified and transmit the same to the Court of Claims for its guidance in the further progress of the cause."

This is a new provision. Similar provisions have permitted particular federal courts to certify questions to this Court, but this provision is the first giving such authority to the Court of Claims.

There are two reasons why a certification by that court which embraces the whole case cannot be entertained by this Court. One is that to accept such a certification and proceed to a determination thereon, in advance of a decision by that court, would be an exercise of original jurisdiction by this Court contrary to the constitutional provision which prescribes that its jurisdiction shall be appellate in all cases other than those affecting ambassadors, other public ministers and consuls and those in which a State shall be a party. Art. III, § 2, cl. 2. The other is that the statute permits a certification only of "definite and distinct questions of law."

Even the restricted certification permitted by the statute invokes action which is rather exceptional in the appellate field. But that such action is appellate is now settled. Early and long continued usage amounting to a practical construction of the constitutional provision requires that it be so regarded.

In § 6 of the act of April 29, 1802, c. 31, 2 Stat. 156, Congress made provision for restricted certifications from the circuit courts to this Court in advance of a decision by the former. That provision remained in force and was given effect for seventy years. Many certifications in both civil and criminal cases were entertained and dealt with under it. Indeed, it was the only mode in which questions of law in cases of several classes could be brought to this Court during that period.

But in exercising that jurisdiction this Court uniformly ruled that it could not entertain the certifications unless they were of distinct questions of law and not of the whole case, for otherwise it would be assuming original jurisdiction withheld from it by the Constitution. *White* v. *Turk,* 12 Pet. 238, 239; *United States* v. *Stone,* 14 Pet. 524, 525; *Nesmith* v. *Sheldon,* 6 How. 41, 43; *Webster* v. *Cooper,* 10 How. 54, 55; *The Alicia,* 7 Wall. 571, 573; *United States* v. *Perrin,* 131 U. S. 55, 58; *Baltimore and Ohio R. R. Co.* v. *Interstate Commerce Commission,* 215 U. S. 216, 224.

And in applying the provision of 1802 and other later provisions permitting certifications this Court, while holding, on the one hand, that it cannot be required through certifications thereunder to pass upon questions of fact, or mixed questions of law and fact; or to accept a transfer of the whole case; or to answer questions of objectionable generality—which instead of presenting distinct propositions of law cover unstated matters lurking in the record—or questions that are hypothetical and speculative, has distinctly held, on the other hand, that the certification of a definite question of law is not rendered objectionable merely because the answer may be decisive of the case, and also that the importance or controlling character of the question certified, if it be a question of law and suitably specific, affords no ground for declining to accept the certification. *United States* v. *Mayer,* 235 U. S. 55, 66, and cases cited.

The practice and rulings just described are equally applicable to certifications under the provision relating to the Court of Claims.

Upon further consideration of the present certificate in the light of that practice and those rulings we are of opinion that the certificate is not open to any valid objection and should be entertained. The question certified is a distinct and definite question

of law and its materiality is adequately shown. Neither in form nor in effect does it embrace the whole case. It does not include any question of fact, but, on the contrary, treats the facts as fully ascertained and definitely states those out of which it arises. No doubt, with these facts ascertained, an affirmative answer to the question would be decisive of the case. But if the answer were in the negative the case would be left where another question of law raised by the plaintiff's petition and mooted in the Court of Claims, but not certified, would need to be resolved by that court before a judgment could be given.

We thus are brought to the solution of the certified question. Counsel for the government concede, and rightly so, that the exemption accorded to a State by § 502 of the Revenue Act of 1917 and § 500(h) of the Revenue Act of 1918 should be construed as extending to her counties, as is done in the administrative regulations. The Court of Claims, evidently entertaining this view of the exemption, inquires whether the transportation described in the question is a service rendered to the county within the meaning of those sections. The transportation is had at the vendor's instance and is his means of getting his lumber to the place of sale and delivery. He engages to deliver f. o. b., not at the place of shipment, but at the place of destination, which is the place of sale and delivery. There is no delivery, and therefore no sale, until after the transportation is completed. Upon these facts, recited in the question, we are of opinion that the transportation is not a service rendered to the county in the sense of the sections cited, but is a service rendered to the vendor. Conceding that the sections are parts of a taxing scheme, and assuming that they are intended to recognize and fully respect the constitutional immunity of a state agency, such as a county, from federal taxation, we think they neither require such transportation to be regarded as a service to the county nor operate to exempt such transportation from the tax.

The tax is not laid on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges. True, it appears that here the transportation was had with a view to a definite sale; but the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. *United States* v. *Normile*, 239 U. S. 344, 348.

It follows that the tax on the transportation cannot be regarded as a tax or burden on the sale. *Cornell* v. *Coyne*, 192 U. S. 418.

As the tax is not laid on the sale or in any wise measured by it the case of *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, referred to in the question and relied on by the plaintiff, is not in point.

Question Answered "No".

A true copy.

Test:

Clerk, Supreme Court, U. S.